

Nov 22, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRACI E VAN HOVEN,

Plaintiff,

v.

RYAN D. McCARTHY, Secretary,
U.S. Department of Army Corps of
Engineers; and UNITED STATES
ARMY CORPS OF ENGINEERS,

Defendants.

NO: 4:19-CV-5191-RMP

STIPULATED PROTECTIVE
ORDER

BEFORE THE COURT is a motion for entry of a stipulated protective order by Plaintiff Traci E. Van Hoven and Defendants Ryan D. McCarthy and United States Army Corps of Engineers. ECF No. 12. A district court may issue protective orders regarding discovery upon a showing of good cause. Fed. R. Civ. P. 26(c). Before issuing a stipulated protective order, a district court judge should ensure that the protective order's restrictions do not infringe on the public's general right to inspect and copy judicial records and documents. *See Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).

1 Having reviewed the protective order and the remaining record, the Court
2 finds good cause to grant the stipulated motion and enter the agreed-upon
3 protective order. Accordingly, **IT IS HEREBY ORDERED** that the parties'
4 motion for entry of a stipulated protective order, **ECF NO. 12**, is **GRANTED**.
5 The protective order in effect is set forth below.

6 1. PURPOSES AND LIMITATIONS

7 Discovery in this action is likely to involve production of confidential,
8 proprietary, or private information for which special protection may be warranted.
9 Accordingly, the parties hereby stipulate to and petition the Court to enter the
10 following Stipulated Protective Order. This agreement does not confer blanket
11 protection on all disclosures or responses to discovery; the protection it affords
12 from public disclosure and use extends only to the limited information or items that
13 are entitled to confidential treatment under the applicable legal principles. The
14 agreement does not presumptively entitle parties to file confidential information
15 under seal.

16 2. "CONFIDENTIAL" MATERIAL

17 "Confidential" material shall include the following documents and tangible
18 things produced or otherwise exchanged: medical records; personnel files; phone
19 records; financial records, applications for employment; information implicating
20 the operational security of U.S. Army Corps of Engineers installations. Nothing
21 contained in this Protective Order shall be construed to restrict the use or
disclosure of documents or tangible things already in a parties' possession or

1 control, or to documents or other tangible things obtained through means other
2 than formal discovery exchanges or subpoena.

3 3. SCOPE

4 The protections conferred by this agreement cover not only confidential
5 material (as defined above), but also (1) any information copied or extracted from
6 confidential material; (2) all copies, excerpts, summaries, or compilations of
7 confidential material; and (3) any testimony, conversations, or presentations by
8 parties or their counsel that might reveal confidential material.

9 However, the protections conferred by this agreement do not cover
10 information that is in the public domain or becomes part of the public domain
11 through trial or otherwise.

12 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

13 4.1 Basic Principles. A receiving party may use confidential material that is
14 disclosed or produced by another party or by a non-party in connection with this
15 case only for prosecuting, defending, or attempting to settle this litigation.

16 Confidential material may be disclosed only to the categories of persons and under
17 the conditions described in this agreement. Confidential material must be stored
18 and maintained by a receiving party at a location and in a secure manner that
19 ensures that access is limited to the persons authorized under this agreement.

20 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
21 otherwise ordered by the court or permitted in writing by the designating party, a
receiving party may disclose any confidential material only to:

1 (a) the receiving party's counsel of record in this action, as well as
2 employees of counsel to whom it is reasonably necessary to disclose the
3 information for this litigation;

4 (b) the officers, directors, employees (including agency counsel), and former
5 employees of the receiving party to whom disclosure is reasonably necessary for
6 this litigation, unless the parties agree that a particular document or material
7 produced is for Attorney's Eyes Only and is so designated;

8 (c) experts and consultants to whom disclosure is reasonably necessary for
9 this litigation and who have signed the "Acknowledgment and Agreement to Be
10 Bound" (Exhibit A);

11 (d) the court, court personnel, and court reporters and their staff;

12 (e) copy or imaging services retained by counsel to assist in the duplication
13 of confidential material, provided that counsel for the party retaining the copy or
14 imaging service instructs the service not to disclose any confidential material to
15 third parties and to immediately return all originals and copies of any confidential
16 material;

17 (f) during their depositions, witnesses in the action to whom disclosure is
18 reasonably necessary and who have signed the "Acknowledgment and Agreement
19 to Be Bound" (Exhibit A), unless otherwise agreed by the designating party or
20 ordered by the court. Pages of transcribed deposition testimony or exhibits to
21 depositions that reveal confidential material must be separately bound by the court
reporter and may not be disclosed to anyone except as permitted under this

1 agreement;

2 (g) the author or recipient of a document containing the information or a
3 custodian or other person who otherwise possessed or knew the information.

4 4.3 Filing Confidential Material. Before filing confidential material or
5 discussing or referencing such material in court filings, the filing party shall confer
6 with the designating party to determine whether the designating party will remove
7 the confidential designation, whether the document can be redacted, or whether a
8 motion to seal or stipulation and proposed order is warranted. During the meet and
9 confer process, the designating party must identify the basis for sealing the specific
10 confidential information at issue, and the filing party shall include this basis in its
11 motion to seal, along with any objection to sealing the information at issue. A
12 party who seeks to maintain the confidentiality of its information bears the burden
13 of proving that the information should be filed under seal, even if it is not the party
14 filing the motion to seal. A party's failure to meet this burden will result in the
15 motion to seal being denied, in accordance with the strong presumption of public
16 access to the Court's files.

17 5. DESIGNATING PROTECTED MATERIAL

18 5.1 Exercise of Restraint and Care in Designating Material for Protection.
19 Each party or non-party that designates information or items for protection under
20 this agreement must take care to limit any such designation to specific material that
21 qualifies under the appropriate standards. The designating party must designate for
protection only those parts of material, documents, items, or oral or written

1 communications that qualify, so that other portions of the material, documents,
2 items, or communications for which protection is not warranted are not swept
3 unjustifiably within the ambit of this agreement.

4 Mass, indiscriminate, or routinized designations are prohibited.

5 Designations that are shown to be clearly unjustified or that have been made for an
6 improper purpose (*e.g.*, to unnecessarily encumber or delay the case development
7 process or to impose unnecessary expenses and burdens on other parties) expose
8 the designating party to sanctions.

9 If it comes to a designating party's attention that information or items that it
10 designated for protection do not qualify for protection, the designating party must
11 promptly notify all other parties that it is withdrawing the mistaken designation.

12 5.2 Manner and Timing of Designations. Except as otherwise provided in
13 this agreement (*see, e.g.*, second paragraph of section 5.2(a) below), or as
14 otherwise stipulated or ordered, disclosure or discovery material that qualifies for
15 protection under this agreement must be clearly so designated before or when the
16 material is disclosed or produced.

17 (a) Information in documentary form: (*e.g.*, paper or electronic documents
18 and deposition exhibits, but excluding transcripts of depositions or other pretrial or
19 trial proceedings), the designating party must affix the word "CONFIDENTIAL"
20 to each page that contains confidential material. If only a portion or portions of the
21 material on a page qualifies for protection, the producing party also must clearly
identify the protected portion(s) (*e.g.*, by making appropriate markings in the

1 margins).

2 (b) Testimony given in deposition or in other pretrial proceedings: the
3 parties and any participating non-parties must identify on the record, during the
4 deposition or other pretrial proceeding, all protected testimony, without prejudice
5 to their right to so designate other testimony after reviewing the transcript. Any
6 party or non-party may, within fifteen days after receiving the transcript of the
7 deposition or other pretrial proceeding, designate portions of the transcript, or
8 exhibits thereto, as confidential. If a party or non-party desires to protect
9 confidential information at trial, the issue should be addressed during the pre-trial
10 conference.

11 (c) Other tangible items: the producing party must affix in a prominent place
12 on the exterior of the container or containers in which the information or item is
13 stored the word "CONFIDENTIAL." If only a portion or portions of the
14 information or item warrant protection, the producing party, to the extent
15 practicable, shall identify the protected portion(s).

16 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
17 failure to designate qualified information or items does not, standing alone, waive
18 the designating party's right to secure protection under this agreement for such
19 material. Upon timely correction of a designation, the receiving party must make
20 reasonable efforts to ensure that the material is treated in accordance with the
21 provisions of this agreement.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

1 6.1 Timing of Challenges. Any party or non-party may challenge a
2 designation of confidentiality at any time. Unless a prompt challenge to a
3 designating party's confidentiality designation is necessary to avoid foreseeable,
4 substantial unfairness, unnecessary economic burdens, or a significant disruption
5 or delay of the litigation, a party does not waive its right to challenge a
6 confidentiality designation by electing not to mount a challenge promptly after the
7 original designation is disclosed.

8 6.2 Meet and Confer. The parties must make every attempt to resolve any
9 dispute regarding confidential designations without court involvement. Any motion
10 regarding confidential designations or for a protective order must include a
11 certification, in the motion or in a declaration or affidavit, that the movant has
12 engaged in a good faith meet and confer conference with other affected parties in
13 an effort to resolve the dispute without court action. The certification must list the
14 date, manner, and participants to the conference. A good faith effort to confer
15 requires a face-to-face meeting or a telephone conference.

16 6.3 Judicial Intervention. If the parties cannot resolve a challenge without
17 court intervention, the designating party may request a ruling by the Court in
18 accordance with the Court's policies and procedures governing resolution of
19 discovery disputes. The burden of persuasion shall be on the designating party.
20 Frivolous challenges, and those made for an improper purpose (*e.g.*, to harass or
21 impose unnecessary expenses and burdens on other parties) may expose the
challenging party to sanctions. All parties shall continue to maintain the material in

1 question as confidential until the court rules on the challenge.

2 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED
3 PRODUCED IN OTHER LITIGATION

4 If a party is served with a subpoena or a court order issued in other litigation
5 that compels disclosure of any information or items designated in this action as
6 “CONFIDENTIAL,” that party must:

7 (a) promptly notify the designating party in writing and include a copy of the
8 subpoena or court order;

9 (b) promptly notify in writing the party who caused the subpoena or order to
10 issue in the other litigation that some or all of the material covered by the subpoena
11 or order is subject to this agreement. Such notification shall include a copy of this
12 agreement; and (c) cooperate with respect to all reasonable procedures sought to be
13 pursued by the designating party whose confidential material may be affected.

14 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

15 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
16 confidential material to any person or in any circumstance not authorized under
17 this agreement, the receiving party must immediately (a) notify in writing the
18 designating party of the unauthorized disclosures, (b) use its best efforts to retrieve
19 all unauthorized copies of the protected material, (c) inform the person or persons
20 to whom unauthorized disclosures were made of all the terms of this agreement,
21 and (d) request that such person or persons execute the “Acknowledgment and
Agreement to Be Bound” that is attached hereto as Exhibit A.

1 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
2 PROTECTED MATERIAL

3 When a producing party gives notice to receiving parties that certain
4 inadvertently produced material is subject to a claim of privilege or other
5 protection, the obligations of the receiving parties are those set forth in Federal
6 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify
7 whatever procedure may be established in an e-discovery order or agreement that
8 provides for production without prior privilege review.

9 10. NON-TERMINATION AND RETURN OF DOCUMENTS

10 Within 60 days after the termination of this action, including all appeals,
11 each receiving party must return all confidential material to the producing party,
12 including all copies, extracts and summaries thereof. Alternatively, the parties may
13 agree upon appropriate methods of destruction.

14 Notwithstanding this provision, counsel are entitled to retain one archival
15 copy of all documents filed with the court, trial, deposition, and hearing transcripts,
16 correspondence, deposition and trial exhibits, expert reports, attorney work
17 product, and consultant and expert work product, even if such materials contain
18 confidential material.

19 The confidentiality obligations imposed by this agreement shall remain in
20 effect until a designating party agrees otherwise in writing or a court orders
21 otherwise.

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order and provide copies to counsel.

DATED November 22, 2019.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Judge